United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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74-1511

To be argued by
Edwin L. Gasperini.

United States Court of Appeals

For the Second Circuit.

SECURITIES INVESTOR PROTECTION CORPORATION,
Plaintiff-Appellant,

against

CHARISMA SECURITIES CORPORATION,
Defendant.

EDWIN L. GASPERINI,
Petitioner-Appellant,

GASPERINI & SAVAGE,
Petitioner-Appellant.

BRIEF OF APPELLANTS, EDWIN L. GASPERINI AND GASPERINI & SAVAGE.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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Preliminary Statement.[1]

Edwin L. Gasperini, Trustee of Charisma Securities Corporation, (hereinafter "Charisma"), and the firm of Gasperini & Savage, Counsel to the Trustee, appeal from an order of the United States District Court, Southern District of New York, (Pollack, D. J.) setting their fees at $3,500 and $6,500, respectively (3a). The Trustee had petitioned the Court for a final compensation allowance of $5,000 (131a) and his Counsel sought $25,000 (125a). These latter amounts were recommended and approved by the Securities Investor Protection Cor-

[1]Numbers followed by the letter "a" in parenthesis herein refer to the relevant page of the Appendix.

poration (hereinafter "SIPC"), who were to make the payments (131a, 22a). SIPC, having supported the applications of the Trustee and his Counsel in their entirety, (136a-141a) has also appealed from the order of the District Court (5a).

The petitioners respectfully submit that the Court below erred in disregarding the recommendation of SIPC, which was entitled to great, if not controlling, weight under the circumstances. The petitioners also submit that the Court below considered factors that had no bearing to the instant liquidation and applied the factors arbitrarily in determining the fees to be awarded the Trustee and his Counsel. Finally, petitioners submit that the fees, which represent hourly rates of $45 and $13 for the respective services rendered by the Trustee and his Counsel, are so grossly inadequate as to constitute an abuse of discretion.

Questions Presented.

1. Did the District Court err in disregarding SIPC's recommendation as to the amount of the fee to be paid to the Trustee and his Counsel, which fees were to be paid by SIPC?

2. Was it error for the District Court to base compensation on factors applicable only to a reorganization proceeding under Section 241 of the Bankruptcy Act?

3. Was compensation fixed arbitrarily and in grossly inadequate amounts?

4. Does the Court of Appeals have the power to enter an Order increasing the fees as requested?

We respectfully submit that the answer to each of these questions should be in the Affirmative.

Statement of Facts.

Edwin L. Gasperini was appointed Trustee of Charisma, by Order of Hon. Milton Pollack, dated March 9, 1972 (28a). Charisma had been out of business for approximately ten months prior to the Trustee's appointment (45a, 46a, 52a). Serious allegations of fraud surrounded Charisma's collapse (46a, 55a-57a). Important records relating to the conduct of the business had apparently been stolen (46a), and customers' monies and securities had disappeared (102a-109a, 79a, 55a-57a). Charisma's chief officer, Stephen L. Adlman, refused to cooperate with the Trustee or his Counsel during the course of the liquidation (95a, 81a-83a).

Despite these difficulties, the liquidation was promptly concluded (49a). The Trustee's Final Report shows that, of thirty-seven (37) customers' claims totaling $134,486.99, twenty-four (24) were allowed and satisfied, by funds advanced by SIPC, in the amount of $42,206.62 (51a, 62a-66a). Thirteen (13) customers' claims, totaling $92,280.37, were disallowed (51a). General creditor claims for $117,766.00 went unsatisfied because the assets of Charisma recovered by the Trustee amounted only to $1,366.46, a sum repaid to SIPC to satisfy administrative expenses (59a-67a).

The Trustee's Final Report and Account was approved, in every respect except the fees requested by Trustee and Counsel, by Order of Hon. Milton Pollack, dated January 9, 1974 (7a).

Up to the time of submitting their applications for compensation, the Trustee expended 77.7 hours in the dis-

charge of his duties (7a, 41a), and Counsel for the Trustee spent 476.4 hours (7a, 41a).[2] The hours expended were never questioned by the Court below and were systemically recorded in time records which were offered to the Court for scrutiny at the time of the fee applications (77a, 117a). The Trustee originally petitioned for compensation of $7,500 and his Counsel for $30,895 (87a, 117a). However, after consultation with SIPC, these amounts were voluntarily reduced to $5,000 and $25,000, respectively (131a, 125a).

Proceedings Below.

By Order, dated February 26, 1974, the District Court denied the compensatory amounts sought by the Trustee and his Counsel and awarded $3,500 and $6,500, respectively (6a, 22a). Thereafter, the Trustee, his Counsel, and SIPC each filed a Notice of Appeal from the District Court's Order pursuant to Section 24 of the Bankruptcy Act and Section 28 U.S.C. 1291 (3a-5a).

Since the procedure on appeal involved matters of first impression, an appeal was also sought under Rule 6 of the Federal Rules of Appellate Procedure. On April 19, 1974, the Court of Appeals permitted Edwin L. Gasperini and Gasperini & Savage to appeal under Sec-

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[2]The figure of 476.4 hours does not include 60 hours of time expended by research assistants (116a). At the time the applications were submitted Counsel estimated that a total amount of 600 hours would be required for the liquidation of the estate, including the time of research assistants (117a). In fact, after the petitions were submitted, an additional 85.6 hours were expended in the liquidation (42a). Accordingly, the total time actually required by Counsel for the liquidation, including the time of research assistants, was 622 hours. Based on these figures Gasperini & Savage received only $10.00 per hour for their services.

tion 24 of the Bankruptcy Act or under Section 28 U.S.C. 1291. SIPC was permitted to appeal under Section 24 or 250 of the Bankruptcy Act. By Stipulation of the parties the appeals were consolidated.

POINT I.

The District Court erred in disregarding SIPC's recomendation as to the amount of compensation to be awarded to the Trustee and his Counsel.

Prior to the submission of the fee requests to the District Court, SIPC reviewed the fee applications of both Trustee and Counsel, and "fully supported" them in an affidavit and letter submitted to the Court (136a-141a). This review by SIPC included an examination of the time records maintained during the liquidation by the Trustee and his Counsel (137a, 141a).

The District Court, however, disregarded SIPC's recommendation, holding (18a):

> "That SIPC has gone on record as 'support[ing] in full the respective applications of the Trustee and his Counsel' adds no weight in the present circumstances."

SIPC was fully familiar with all aspects of the liquidation and had worked, in close cooperation, with the Trustee and his Counsel during the entire course of the proceeding (See 80a-84a paragraphs 11, 13, 16 and 17; 55a-56a paragraphs 26 and 27; 136a-141a).

As further evidence of SIPC's supervision, the Affidavit of Theodore Focht, Esq., SIPC Counsel, dated December 6, 1973, indicates that, after discussions on the

subject of compensation, the Trustee and his Counsel agreed to reduce their requests for compensation by 22% (136a-138a). Nevertheless, the District Court inexplicably concluded that SIPC "blindly rubber stamped" the fee applications involved herein (18a).

In disregarding the recommendation of SIPC, which had supervised the entire liquidation, and in substituting its own unsubstantiated conclusions as to the value of the services performed, the District Court committed error.

a) Case Law.

Courts have frequently relied on the recommendations of advisory bodies, such as the Securities and Exchange Commission, in setting trustee and counsel fees. *In re General Economics Corporation,* 360 F. 2d 762 (2d Cir. 1966); *Surfact Transit, Inc., v. Saxe, Bacon & O'Shea,* 266 F. 2d 862 (2d Cir. 1959); *In re TMT Trailer Ferry, Inc.,* 434 F. 2d 804 (5th Cir. 1970).

In *In re Imperial "400" National, Inc.,* 432 F. 2d 232, 240 (3rd Cir. 1970), the Court observed:

> "As noted above, the SEC has taken part in this proceeding since its inception. Only the SEC has examined the time sheets, and it was the only party to appear in opposition to each of the petitions. Because of its experience in such matters, its impartiality, and its sole familiarity with the relevant facts in this case, its recommendations should be given great weight."

In the leading case of *Finn v. Childs Co.,* 181 F. 2d 431, 438 (2d Cir. 1950), the Court went further and held that under the circumstances there presented, the District Court should not exceed the findings and conclu-

sions of the SEC "without definite findings and conclusions showing why this step is deemed necessary." This holding has been followed in subsequent cases. *Scribner & Miller v. Conway,* 238 F. 2d 905 (2d Cir. 1956); *In re Solar Mfg. Corp.,* 215 F. 2d 555 (3rd Cir. 1954); *In re Polycraft,* 289 F. Supp. 712, 722 (D. Conn. 1968).

Recently, in *SEC v. Glendale Securities Corp.,* 367 F. Supp. 1086, 1087 (E. D. N. Y. 1974), the District Court awarded compensation in a SIPC liquidation in the amount recommended by SIPC, stating:

> "The nature of the case, perhaps of any matter under the statute, is such that the Court is not intimately exposed to the legal problems that administration actually presents and that account for the greatest part of the time expended. Much must be taken on faith, and great reliance must be placed on the views expressed by SIPC and its counsel, and on the presence as a quasi-party of the SEC. Particularly is that so in such a case as the present one in which the allowance claims justified by time expended and the quality of effort exerted must produce a total that, when added to the necessarily high cost of retained accounting services, is undeniably large in terms of assets, valid claims, and, even, of invalid and contested claims, and, more especially, when thought is given to the future allowance claims that must accrue."

The District Court's rejection of SIPC's recommendation runs counter to authorities cited herein, and overlooks the unique importance of a SIPC recommendation in matters such as that now before the Court.

b) SIPC's Statutory Authority.

The intent of the Securities Investor Protection Act (15 U.S.C. §78 aaa *et seq.*) (hereinafter "SIPA") was to place the responsibility and control of the liquidation of

stricken brokerage houses in a quasi-governmental corporation, *i. e.*, SIPC. SIPA was designed to meet needs in a manner similar to the workings of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. 1970 U. S. Code Cong. & Adm. News, p. 5255. To that end, the initial selection of the Trustee and his Counsel was placed within the control of SIPC under Section 5 (b) of SIPA:

> "(3) Appointment of Trustee—If the Court grants an application and makes an adjudication under paragraph (1), the Court shall forthwith appoint as trustee for the liquidation of the business of the debtor in accordance with Section 6, and as attorney for such trustee, *such persons as SIPC shall specify.*" (Italics added.)

A challenge to the authority of SIPC to select the Trustee of its choice was considered and rejected by this Circuit in *SEC and SIPC v. Oxford Securities, Ltd.*, 486 F. 2d 1396 (2d Cir.) *reversing* 354 F. Supp. 301 (S. D. N. Y. 1973).[3]

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[3]SIPC, in a letter to the District Court explained the circumstances in the Charisma liquidation which led to the selection of Mr. Gasperini to act as Trustee, stating (140a):

> "In the Charisma liquidation the opportunities for fraud and misappropriation of customer and firm securities were apparent. Charisma had been out of business for nearly ten months prior to the time Mr. Gasperini was appointed. He was asked to undertake the liquidation in part because of his extensive experience in litigation and investigatory work. The disappearance of records, the incomplete books, and the atmosphere of fraud which pervaded this estate called for particularly cautious and diligent investigation * * *."

The District Court, however, did not concur in SIPC's appraisal of the need for a competent and experienced Trustee, characterizing the liquidation as "prosaic" (7a), "a pure accounting function" (14a), involving "routine, almost mechanical, administrative tasks" (21a).

Concomitant with authority to select the Trustee of its choice, SIPC was given other broad powers. See §3(b) of SIPA, and Section 6 of SIPA which provides in pertinent part as follows:

> "(b) Powers and Duties of Trustee
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> * * *
>
> "In addition, a trustee shall have the right—
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> "(A) *with the approval of SIPC, to hire and fix the compensation* of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including but not limited to accountants) that are deemed by such trustee necessary for all or any purpose of the liquidation proceeding, and
>
> * * *
>
> *and no approval of the court shall be required* therefor * * *." (Italics added.)

Because of the possibility that the amount of compensation to be paid from the estate may conflict with the interests of the creditors of the estate,[4] it is necessary and proper, and so recognized by SIPC, for the Court to review and approve applications for compensation. However, in an estate such as Charisma, which essentially had no assets, and where the funds for compensation must be paid by SIPC, there can be no possible conflict with the interests of creditors. In such a situation, which exists herein, SIPC's interest in preserving its own funds and in performing its statutory duties must be given paramount, if not controlling, consideration.

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[4]Under SIPA Section 6c(2)B, SIPC may recover from the estate funds expended for the administration of the estate including compensation to the trustee and counsel.

Under the authorities cited and in light of the broad powers given to SIPC by Congress, it was error for the District Court to disregard SIPC's recommendation on compensation to the Trustee and his Counsel.

POINT II.

The Court below erroneously considered factors that had no relevancy to the instant liquidation.

Relying on Section 241 of the Bankruptcy Act,[5] which is incorporated by reference in Section 6(c)(1) of SIPA, and on an earlier opinion in this liquidation, by the same District Court Judge, dealing with an interim fee request, the Court below stated the relevant standards as follows (13a):

> "'The standards for fee allowances in a reorganization proceeding call for the ascertainment of the level of services required, consideration of the *burden that an estate can safely bear,* the value of required services and the overall relationship of the compensation to the *size of the estate* being administered under a concept of reasonable economy of administration. [citation omitted].

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[5]Section 241 of the Bankruptcy Act states in pertinent part as follows:

> "Section 241. The Judge may allow *** reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—
>
> * * *
>
> (3) by the trustee and other officers and the attorneys for any of them."

"'[T]he Court should take notice of whether professionals or para-professionals may be utilized for the services needed, whether the bulk of the work will require the services of accountants rather than lawyers, and whether the work required is legal or clerical in nature [citations omitted]. 352 F. Supp. at 307.'"

"In addition to the foregoing, the Court must consider the time and labor required, the novelty of the problems presented, and the difficulty of the questions involved." (Emphasis added.)

Petitioners submit that the "size of the estate" and the "burden that an estate can safely bear," matters expressly considered by the Court below, are totally irrelevant to the instant liquidation. Such matters are concededly pertinent in a corporate reorganization where the interests of creditors and the ability of the debtor corporation to continue in business must be weighed against the fees requested. Considerations such as "the size of the estate" and "the burden the estate can safely bear" have, however, no reasonable application in a SIPC liquidation, particularly one such as Charisma, where there are virtually no assets in the estate, and where the funds to compensate the Trustee and his Counsel must be paid by SIPC.

The need for prompt, conscientious administration of a stricken brokerage house under the public interest requirements of SIPA is as great where the estate is small (or, as here, practically non-existent) as where it is large. The public's confidence in the brokerage industry is especially undermined in cases where customers' monies and securities have been removed and records stolen. Yet this is precisely the type of situation which may yield a small or non-existent estate. To hold, as the District Court did herein, that "the value of the estate is a highly significant factor

to be appreciated" (10a) in the award paid to the Trustee and his Counsel, is to emasculate effectively the efforts of SIPC to obtain an effective administration for small estates.[6]

POINT III.

The Court fixed compensation arbitrarily, and in amounts that were grossly inadequate.

The District Court, in Charisma, specifically excluded from the list of compensable services "many hours of extensive research into the background of the securities in-

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[6]As the Court stated in *SEC v. Glendale Securities, Inc., supra*, at 1087;

> "While substantially all that is said in *SIPC v. Charisma Sec. Corp.*, S.D.N.Y. 1972, 352 F. Supp. 302, must command assent, it is evident that in such a case as the present one intervention under the [Securities Investor Protection] Act has been necessary and remedial in more than simply bringing to the situation financial protection and support, and the assistance of orderly administration armed with statutory safeguards against races of diligence and the other threats of inequitable distribution and destructive liquidation that beset distressed securities dealers. The quasi-public service required in this unfortunate type of case, reflecting a public interest that required attention and loyal service (see *Charisma, supra*, 352 F. Supp. at 306), must be given special emphasis over the money results potentially achievable. Given the statutory frame-work and the purposes of the Act, it cannot operate as intended unless trustees and their counsel are adequately compensated for work necessarily done in an efficient manner."

dustry"[7] (14a-15a), time spent by the Trustee and his Counsel prior to their appointment[8] (16a), time spent reviewing work performed by accountants[9] (14a), and "many of the administrative matters cited by the applicants" (14a). The Court did not explain how much time was thus excluded, or how such calculations could be made without an examination of the timesheets of the Trustee and his Counsel. Moreover, the District Court criticized the Trustee and his Counsel for "attempting to bill their time at the 'going rate' for law firms in New York" (11a). The record does not support any such allegation or inference. Nor did the Court below suggest the rate at which the time of the Trustee and his Counsel should be billed. Furthermore, the basis on which the Court decided to award what amounts to a $45.00 hourly rate to the Trustee and a $13.00 hourly rate to his Counsel remains unexplained.

Nowhere in its Opinion does the District Court take note that prior to the appointment of the Trustee, the

[7]The District Court implies that the Applications request compensation for *many* hours of *extensive* research into the background of the securities industry. Yet, reference to Trustee's and Counsel's applications would indicate otherwise (79a, 118a). The specific points on which legal research was required are set out in Counsel's application and do not include any items involving the background of the securities industry (100a-102a). The Trustee's reference to the securities industry was in the context of his conferences with other SIPC trustees on mutual problems (79a); an examination of the time records would have so indicated.

[8]The time involved here was minor in amount, 15 hours (77a, 116a). However, it involved important services to the estate, including the taking of possession of Charisma's remaining records to safeguard them from further theft, and the initial hiring and discussions with the accountants.

[9]In light of the circumstances presented here, review by Counsel of the accountant's work was absolutely necessary and in no way duplicated their efforts.

Company's records had been stolen from the offices of the Securities and Exchange Commission (46a), the cash and securities of the firm and its customers had disappeared (102a-109a), and the firm's chief officer refused to cooperate with the Trustee (94a-95a). Neither does the Court make any reference to the details of the investigation conducted (51a-58a, 102a-109a). The District Court requested for inspection the attorney's file of customer claims against Charisma (37a), and from this material apparently drew broad conclusions as to the type of work involved in the liquidation (8a-9a). However, as noted in a letter by the Trustee to the Court, the total time expended by the Trustee and his Counsel on customer claims represented 49.9 hours, or approximately 9% of the total time expended in the liquidation (41a).

The Court concluded that "under all the facts and circumstances presented herein," reasonable compensation for the Trustee would be $3,500 and for his Counsel $6,500 (22a). No explanation was given for arriving at these amounts. It is significant, however, that the combined allowance of $10,000 is approximately 23% of $43,000, an amount which the Court referred to in discussing "the size of the estate" (9a-10a).[10] This percentage falls squarely within the range of percentage of recovery traditionally awarded by the courts to attorneys in stockholder derivative actions. As stated by the Court in *Rosenfeld v. Black*, 56 FRD 604, 606 (S.D.N.Y. 1972) a stockholder derivative action:

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[10] It is not clear why the District Court selected the amount of funds advanced by SIPC to satisfy customer claims, $43,000, to precede its discussion of the size of the estate. If any figure is relevant, the total value of claims against the estate, approximately $115,000, more nearly summarizes the value of the estate involved. To base an award on the amount of funds advanced by SIPC to claimants, merely places a premium on generosity by the Trustee.

> "Traditionally, courts in this district and elsewhere have awarded fees in the range of 20% to 30% of the recovery. See *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 47 FRD 557, 559 (E.D. Pa. 1969), where 25% was awarded on a settlement of $22,000,000. Illustrative of awards in this court, Judge Ryan (*Richland v. Cheatam*, 66 Civ. 1330) awarded about 25%; Judge Levett (*Stull v. Kaymarg Consolidated Corporation*, CCH Fed. Sec. L. Rep. paragraph 92, 508) awarded 33⅓%; Judge Tenney (*Jamison v. Barr*, 69 Civ. 2795, unreported) awarded about 30%; Judge Tyler (*Zeftlin v. Bergen*, 66 Civ. 4479) awarded 24%."

It seems apparent that, despite the District Court's invocation of a complicated set of factors to be considered in setting compensation, the dominant consideration employed was the size of the estate. The time expended by the Trustee and his Counsel was virtually ignored.

This Court, in the recent civil antitrust case of *City of Detroit v. Grinnell Corporation*, ... F. 2d ......, Docket No. 73-1211, 73-1420 (2d Cir. 1974), reversed an award of compensation to attorneys, which was ostensibly based on an eight-factor formula:

> "This conceptual amalgam is so extensive and ponderous that it is probably not employed in any precise way by those courts espousing adherence to it.
>
> "That fact is brought home here by the opinion of the district court which, while eschewing any reliance upon a percentage fee approach, ostensibly applied these cumbersome rules but nevertheless concluded that the fee award ought to amount to $1.5 million, namely, 15 percent of the settlement recovery.
>
> "As the Third Circuit has recently pointed out in *Lindy Bros. (supra)*, more is needed than a mere listing of factors. Such a list, standing alone, can never provide meaningful guidance.

"The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case.

"Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the Bar and the courts * * *"

In *Lindy Bros. Bldrs., Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 166-167 (3rd Cir. 1973), the Court reversed an award of compensation in a class action, stating:

"The mere listing of four factors for consideration by the Court makes meaningful review difficult and gives little guidance to attorneys and claimants."

* * *

"* * * [W]e stress * * * the importance of deciding, in each case, the amount to which attorneys would be entitled on the basis of an hourly rate of compensation applied to the hours worked. This figure provides the only reasonably objective basis for valuing an attorney's services."

City of Detroit v. Grinnel Corporation, supra, is only the latest in a series of cases that have emphasized the importance of time as a basis for compensation. Others include *In re Borgenicht*, 470 F. 2d 283 (2d Cir. 1972); *In re Wal-Feld Company*, 345 F. 2d 676 (2d Cir. 1965); *In re Hudson & Manhattan R. R. Co.*, 339 F. 2d 114 (2d Cir. 1964); See also *In re Hardwick & Magee Co.*, 355 F. Supp. 58 (E.D. Pa. 1973). In *In re Hudson & Manhattan Railroad Company*, 339 F. 2d 114, 115 (2d Cir. 1964) the Court, in reviewing a request for compensation by the attorney to a Trustee in a corporate reorganization, stated as follows:

> "Lawyers are well aware that, especially where services of the nature here involved are spread over a period of time and ultimate payment is virtually assured, they are valued principally on the basis of the time required."

Once the District Court determined that there were no assets available for distribution to creditors, and that no creditors objected to the conclusion of the estate, the time expended was the principal remaining factor relevant to the compensation of the Trustee and his Counsel. It is highly significant in this regard that the time expended by Trustee and Counsel was not the subject of challenge by either the Court or by SIPC. The petitioners submit that the fees awarded for the time expended, representing an hourly rate of $45 for the Trustee and $13 an hour for his counsel, are grossly inadequate. This Court can (as discussed in Point IV, *infra*) and should grant the fees requested by the Trustee and his Counsel, which fees were also recommended by SIPC.

POINT IV.

The Court of Appeals has the power to grant the fees requested by the Trustee and his Counsel.

Appellants respectfully urge this Court to increase the fees to the amounts requested. There is no reason to remand the case to the District Court since this Court has the authority to increase the fees and has available to it all the material which was considered by the Court below.

There is no question of this Court's power to increase the fees. Thus, in *United States v. Equitable Trust Co. of N. Y.*, 283 U. S. 738 (1931) the Supreme Court modified,

without remand, fees awarded by the Court of Appeals (34 F. 2d 916, 2 Cir. 1929), which had modified without remand, fees awarded by the District Court. See also *Harris v. Chicago Great Western Ry. Co.*, 197 F. 2d 829 (7th Cir. 1952); *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F. 2d 561 (7th Cir. 1951).

As the Court of Appeals stated in *In re TMT Trailer Ferry, Inc.*, 434 F. 2d 804, 806 (5th Cir. 1970):

> "Though the District Court has a broad discretion in the award of fees, the appellate court is likewise an expert on the reasonableness of fees, and may exercise an independent judgment with reference thereto * * *. We conclude that the circumstances here warrant the use of our own independent judgment in this free [*sic*] controversy."

There is, moreover, authority that the recommendation of a quasi-governmental body such as SIPC should be followed absent a clear finding of reasons to do otherwise. Thus, in *Scribner & Miller v. Conway*, 238 F. 2d 905 (2d Cir. 1956), in remanding to the lower court, for the sole purpose of entering an order in the amount recommended by the Securities and Exchange Commission, this Court stated:

> "In *Finn v. Childs Co., supra*, 2 Cir., 181 F. 2d 431, we held under the circumstances there disclosed that the recommendation for allowances of the S.E.C., made by this responsible and disinterested public agency after close familiarity with the entire proceedings and careful study and report, should be followed unless the reorganization judge showed reasons otherwise based on specific findings * * *. We think that principle even more apposite here in view of the particular circumstances noted above. True, the able judge has sent forth his deep conviction otherwise; but we are constrained to disagree." 238 F. 2d at 907.

And as the court noted, in *In re TMT Trailer Ferry Inc., supra,* in adopting the S.E.C. recommendation:

> "The Securities and Exchange Commission having participated fully in these proceedings (now in their thirteenth year), from the very beginning of the filing of Chapter X reorganization, is intimately familiar with the services rendered by the Committee's counsel over a long period of years, and strongly recommends approval of an interim amount of $60,000 counsel fees and $10,000 reimbursement of expenses as partial allowances for services and expenses and further recommends that the interim award shall not be subject to vacation, setting aside, reduction or modification except upon proof of legal disqualification.
>
> "* * * Accordingly, in order to do substantial justice, and to prevent undue hardship, we believe we should follow the S.E.C. recommendation * * *" 434 F. 2d at 806-807.

In *Charisma,* SIPC, having been given special statutory authority to initiate and supervise the present liquidation, has recommended payment of fees to the Trustee and his Counsel of $5,000 and $25,000 respectively. No estate or creditor interests are involved since in this liquidation there are essentially no assets for distribution. The funds for compensation of the Trustee and his Counsel must be paid by SIPC. Under these circumstances, there is no rational basis on which to disregard SIPC's opinion, especially where SIPC's recommendation is based on a determination of the actual time spent by the Trustee and his Counsel, after an examination of their time sheets.

This Court is fully justified in increasing the fees. Petitioners submit that there has been clear error on the District Court's part both in applying the law and in evaluating the facts. In addition, we submit that there was a manifest abuse of discretion in the setting of fees in grossly

inadequate amounts, and that the unquestioned expenditure of time by the Trustee and his Counsel, as well as the recommendation and approval of SIPC (the party charged by Congress with the duty to supervise security house liquidations), amply supports the requested fees.

Conclusion.

For all of the foregoing reasons, it is respectfully submitted that the Court below erred in setting the fees of the Trustee and his Counsel and that this Court should enter an Order awarding the fees as requested.

Respectfully submitted,

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